

**In the Supreme Court**

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OF THE  
**United States**

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of  
Veterans' Affairs, et al., *Appellants*,

v.

NATIONAL ASSOCIATION OF  
RADIATION SURVIVORS, et al., *Appellees*.

On Appeal From  
The United States District Court  
for the Northern District of California

**BRIEF FOR THE  
NATIONAL ASSOCIATION OF ATOMIC VETERANS  
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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No. 84-571

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### BRIEF FOR THE NATIONAL ASSOCIATION OF ATOMIC VETERANS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

#### THE INTEREST OF AMICUS CURIAE<sup>1</sup>

The National Association of Atomic Veterans ("NAAV") is a nationwide membership organization composed primarily of U.S. veterans exposed to atomic radiation during military service ("atomic veterans"), their families and their survivors. Its co-founder, Orville Kelly, was one of the few American veterans ever determined by the Veterans Administration ("V.A.") to be

<sup>1</sup> Pursuant to Supreme Court Rule 36.2, NAAV requested and was granted permission by counsel for all parties to file this brief, and letters of consent will be filed concurrently herewith.

entitled to service-connected disability compensation for a radiation-related disability. Establishing his entitlement consumed seven years of his life. Seven months later, Kelly died.

Kelly's experience with the V.A. alerted him to the almost insurmountable barriers faced by atomic veterans in proving their entitlement to compensation. In response, he and his wife founded NAAV as a non-profit organization<sup>2</sup> dedicated to promoting the interests of atomic veterans, especially helping them establish entitlement to V.A. compensation for radiation-related disabilities.

Many of NAAV's members are severely disabled, some terminally ill, and many are recipients of service-connected death and disability ("SCDD") compensation, but very few receive SCDD compensation for radiation-related disabilities. Many have applied for compensation for the radiation-related injuries they have suffered, but the \$10 attorneys' fee limitation under 38 U.S.C. §§ 3404-3405 has prevented them from presenting their claims in a meaningful way, and their applications have been denied. Many other members of NAAV have been deterred from applying due to the evident futility of doing so. On behalf of its members, and especially on behalf of unsuccessful applicants and potential applicants for SCDD compensation, NAAV presents its views as *amicus curiae*, and joins the Appellees in urging affirmance of the district court's order.

### STATEMENT OF THE CASE

The operation of the V.A. claims adjudication system is accurately described in the district court's opinion (J.S.App. 28a-38a) and in Appellees' Brief at 2-20. NAAV joins in Appellees' Statement of the Case. However, we add the following further statement of facts about the individual Appellees:

In December 1940, Appellee Albert Maxwell, then 21 years old, was inducted into the Army (J.A. 46). When Pearl Harbor was attacked, Maxwell was stationed in the Philippines (J.A. 46). He fought in the Battle of Bataan from December 1941 until Bataan fell in April 1942 (J.A. 46-47). Maxwell was one of

<sup>2</sup> NAAV gratefully acknowledges the services and materials provided free of charge by Jeffries Banknote Co. in connection with the printing of this brief.

approximately 5,000 survivors of the 22,000 soldiers in the Bataan Death March (J.A. 21, 48-49). He was held as a prisoner of war in the Philippines (J.A. 48-49), and was confined for a time in a Philippine prison under sentence of death (J.A. 49). His death sentence was commuted as he stood before the firing squad (J.A. 49). He was later herded, along with 1,100 other prisoners, into the hold of a "hell ship" destined for Japan (J.A. 21, 49). The ship was torpedoed and sunk, and Maxwell was among the 52 survivors picked up by a Japanese merchantman (J.A. 21).

Maxwell was eventually imprisoned in a POW camp near Nagoya, Japan (J.A. 50), 65-80 miles from Hiroshima (J.A. 51, 67). He was still there when Hiroshima and Nagasaki were bombed, and he was puzzled by the "black rain," which he later learned was nuclear fallout (J.A. 51, 66, 67). A few days after the bombing, Maxwell was sent into Hiroshima to clear debris from the roads (J.A. 51, 67). Maxwell used his bare hands as tools and wore no protective clothing (J.A. 67). He drank the water in the bombed areas and ate food cooked in the open (J.A. 67). About seven to ten days after he began to work on the clean-up detail, he developed nausea and itching, welts, blisters and a rash covering his arms and legs (J.A. 51, 67). In September 1945 his POW camp was liberated by United States Marines (J.A. 51). Maxwell, who is 6'3" tall, weighed 89 pounds (J.A. 52).

After his return to the United States, Maxwell intended to make a career of the Army, but was medically discharged in 1947 with a 50% disability rating, later reduced to 40% (J.A. 82), for residuals of beriberi, malaria, shrapnel injury to the right ankle, optic atrophy, conjunctivitis and diminishing eyesight of the left eye (J.A. 22, 54-56).

Maxwell and his wife had five children, born between 1948 and 1961 (J.A. 57-61, 76-77). Four of the five children died in infancy or early childhood due to rare congenital diseases which family doctors believe were associated with Maxwell's exposure to radiation (J.A. 57-61, 70-71, 76-77).

In 1981, Maxwell was diagnosed as having multiple myelomas, a rare form of bone cancer which the Federal Government has identified as "meaningfully" associated with exposure to radiation (J.A. 67). His doctor believes that his cancer is related to his exposure to radiation in Japan during World War II (J.A. 67-68). Maxwell filed a claim with the V.A. to increase his disability rating to 100% on the basis of his multiple myelomas and other medical problems (J.A. 74-77, 79-80, 83-86). He asked an attorney to represent him in connection with his V.A. claim, but the attorney declined because of the \$10 limitation on attorneys' fees (J.A. 312-314). The V.A. denied Maxwell's claim, giving as the sole reason:

"The medical evidence of record would not support a grant of service connection for the disabilities of multiple myelomas, a degenerative joint disease, or a peptic ulcer. An increase in the evaluation of your disabilities already established as service connected is not warranted" (J.A. 81).

This, or a very similarly worded "reason" for denial is, in fact, a stock paragraph used by the V.A. in explaining denials of benefits (J.A. 95, 386).

Maxwell has been able to work only sporadically since 1978 (J.A. 80, 307), and not at all since 1983 (J.A. 84-85, 308). He has now spent his life's savings and has been forced to sell his home and declare bankruptcy (J.A. 322-323). He is 64 years old, and both he and his wife depend on his SCDD compensation for their modest existence (J.A. 46, 322).

Unfortunately, Maxwell's experience is not an isolated case. The other individual Appellees have suffered equally tragic consequences of atomic radiation exposure. Appellee Reason Warehime is a thrice-wounded World War II and Korean War veteran who was among the occupational forces that entered Nagasaki on a clean-up detail in August 1945 (J.A. 195). In 1953, Warehime was assigned to duty at an atomic bomb test site in Arizona, and was positioned in a trench located a mere 2,000 yards from ground zero (J.A. 196). He and the men under his command were actually located in the "stem" of the mushroom cloud that resulted from the blast (J.A. 196). The heat was so intense that objects at the edge of the trench were

reduced to charcoal (J.A. 196). The men in the trench were surrounded by a "dense fog" of radioactive fallout, and they immediately became nauseous (J.A. 196). After the blast, and pursuant to orders from his superiors, Warehime ordered his men to advance to ground zero (J.A. 196). Several months later, Warehime lost all of his body hair (J.A. 196).

Warehime now suffers from osteoporosis of the bone, muscle atrophy, sterility, cataracts and lung cancer, which he believes were caused by his exposure to radiation (J.A. 196). His left lung was surgically removed in 1982 (J.A. 196). He is confined to a wheelchair, is partially paralyzed, and is blind in one eye (J.A. 24, 196). Warehime received a 30% disability rating from the V.A. for conditions unrelated to his exposure to radiation (J.A. 196-197). He has filed several claims for his radiation-related disabilities, which consistently have been denied (J.A. 197). His most recent claim was filed in 1980 (J.A. 197). Nearly five years later, after numerous hearings, decisions, reversals, remands and deliberations, that claim is still pending (J.A. 197). Warehime has been unable to hire a private attorney to help him pursue his claim because of the \$10 fee limit (J.A. 198). Both he and his wife live solely on the \$549 per month that he receives from the V.A. (J.A. 199).

Appellee Doris Wilson is the widow of a seaman who was exposed to radiation while assigned to a series of ships involved in atomic testing in the Pacific Theatre between 1943 and 1947 (J.A. 25, 216). During one of those tests, several men on board lost their hair and others became nauseated (J.A. 216). The officers and crew were disturbed by their inability to decontaminate the ship (J.A. 216). Wilson's husband died of pancreatic cancer in 1980 and, based on her belief that his death was caused by his exposure to radiation in the military, Wilson applied for V.A. benefits (J.A. 216). Her application was denied (J.A. 216). Wilson, too, was unable to obtain legal assistance due to the fee limitation (J.A. 217).<sup>3</sup>

<sup>3</sup> The late Don Cordray, a plaintiff when this litigation began, did not live to see the case reach the Supreme Court. He succumbed to oat cell carcinoma in March 1984. During Operation Crossroads in Bikini in 1946, he had witnessed tests Able and Baker from the deck of the USS Fulton, where he and

(footnote continued on next page)

## SUMMARY OF ARGUMENT

The V.A. is the only agency in the country empowered to compensate veterans and their survivors for disability or death resulting from military service. Under the *Feres* doctrine, veterans cannot sue for such disabilities under the Federal Tort Claims Act. Moreover, decisions of the V.A. are absolutely final; judicial review is prohibited by statute.

By the V.A.'s own admission, the \$10 fee limitation "effectively precludes attorney representation before the V.A." S. Rep. No. 97-466, 97th Cong., 2d Sess. 102 (1982). So sweeping is its application that it not only precludes V.A. claimants from securing representation by attorneys in V.A. hearings, but also prevents them from obtaining legal advice in the investigation, development and preparation of their claims. The statute likewise precludes attorney representation in V.A. appeals, even though such appeals constitute a final determination on the merits.

The problem is most serious in complex cases, such as atomic veteran, Agent Orange and post-traumatic stress disorder ("PTSD") claims, where proof of causation is especially difficult. Effective presentation of such claims would routinely require legal, scientific and medical research, development of statistical data, acquisition of information concerning the disposition of similar claims, physical examination by medical specialists and the testimony of medical experts.

Even in less complex cases, the V.A. application and appeal procedures are difficult for a layman to grasp. Claimants are commonly required to call witnesses on their behalf and to gather and present medical data and other documentary evidence to prove the existence of a disability, its causation and

(footnote continued from previous page)

18 others had been positioned as "guinea pigs" (J.A. 146). The *Fulton* was ordered to move in immediately after blast Able to recover scientific test materials from the target ships (J.A. 20, 146). Cordray was aboard the *Fulton* when it towed one of the target ships to Pearl Harbor (J.A. 147). He remained aboard for over three months after the blasts, while the ship was highly contaminated with radiation (J.A. 147). Before his death, Cordray had applied for service-connected disability benefits. He received a 10% disability rating for a condition unrelated to his radiation exposure (J.A. 147, 150), but continued to press for increased benefits for his oat cell carcinoma and related conditions. His radiation-related claims were denied (J.A. 147-149).

the degree of impairment. Legal points, such as presumptions of service-connection, often dictate the outcome of an application, yet claimants have no recourse to professional advice in understanding such legalities. And, too, applicants are often severely disabled, which makes self-representation all the more difficult and ineffective. Though free assistance is available from service organization representatives, this assistance is inadequate due to heavy caseloads and lack of legal training.

The district court correctly held that this virtual prohibition on the participation of attorneys in the claims process denies claimants procedural due process and violates their First Amendment rights of petition and association. This Court should affirm that decision.

The criteria for entitlement to SCDD compensation are objectively defined by statute, and the award of benefits is not discretionary. These factors make such benefits a matter of statutory entitlement and create a protectible property interest for applicants for SCDD compensation, as well as for its recipients. Indeed, it is especially important that applicants be afforded procedural safeguards in the claims process, since it is most often at this initial adjudicatory stage that benefits are denied in complicated or controversial cases.

The freedom to retain counsel for advice concerning one's legal rights is fundamental, and cannot lightly be stripped away. It is one of the means by which individuals may shield themselves from arbitrary government action. Moreover, the value of attorneys in adjudicative proceedings, however "informal," has often been recognized by this Court. Representation by retained counsel is uniformly allowed in similar benefit adjudication schemes, either as a matter of due process or by statutory provision. Appellants cite no cases in which claimants to statutory entitlements similar to V.A. benefits are precluded from being represented by retained counsel; this harsh rule for V.A. claimants is truly an anomaly.

Claimants' interests in obtaining a fair hearing and being allowed to consult attorneys on their legal rights clearly outweigh the relatively weak interests of the government in

maintaining the fee limit, especially when it is of such questionable value in achieving any of the asserted statutory purposes. Appellants misleadingly suggest that removal of the fee limit would somehow subvert the Congressional intent that the V.A. operate in an informal and nonadversarial manner. This simply is not true. Appellees do not challenge the procedures established by Congress for V.A. claims adjudication and do not seek to disrupt the informality of that system. They seek only the assistance of counsel in complying with those procedures so that they might have a meaningful opportunity to present their claims.

This Court also should affirm the district court's order on First Amendment grounds. A claim for SCDD benefits constitutes an exercise of the First Amendment right to petition the government for redress of grievances, and the \$10 fee limit substantially impairs the ability of claimants to formulate those grievances. Such an infringement of the First Amendment is warranted only if it is substantially related to a compelling government interest and is narrowly drawn to avoid unnecessary encroachment. That test is not met in this case.

## ARGUMENT

### I. THE \$10 FEE LIMIT EFFECTIVELY PRECLUDES SCDD CLAIMANTS FROM CONSULTING ATTORNEYS IN DEVELOPING AND PRESENTING THEIR V.A. CLAIMS AND THEREBY DEPRIVES THEM OF PROCEDURAL DUE PROCESS.

#### A. SCDD applicants, like recipients, have a property interest in the expected receipt of compensation.

That recipients of SCDD compensation have a property interest in continued receipt of such benefits cannot seriously be disputed. Recipients of welfare and social security benefits have a property interest in those entitlements, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), as do recipients of V.A. educational benefits and pensions, *Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980); *Plato v. Roudebush*, 397 F. Supp. 1295, 1308 (D. Md. 1975). Any recipient of governmental benefits has a property

interest in such payments, so long as the expectation of continued receipt is grounded in the statute establishing the entitlement. Indeed, Appellants seem to concede that SCDD recipients have a property interest in such compensation. Appellants' Brief at 46 n.49.

However, it is especially important that the property interests of initial applicants also be recognized, for it is in the application stage that complex claims are most often denied and procedural protections, including legal representation, are most needed to assure a fair adjudication. This Court has not squarely decided whether applicants for statutory benefits have a property interest entitling them to due process. However, its recognition of the due process rights of applicants in government licensing and regulation cases leads inevitably to the conclusion that applicants for statutory entitlements must also be accorded due process.<sup>4</sup>

Many lower Federal courts have specifically held, in the context of other benefit distribution schemes, that due process does apply in the application stage, for it is the statutory creation of an entitlement, and not the actual receipt of benefits, that establishes the property interest. Thus, where the qualifications for entitlement are objectively defined by statute and the dispensation of benefits is not discretionary, applicants, like recipients, have a property interest sufficient to invoke due process protections.

The Ninth Circuit has unequivocally adopted this rule. *Griffeth v. Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), cert. denied, 445 U.S. 970 (1980) (unsuccessful applicant for general relief had a property interest sufficient to allow a due process

<sup>4</sup> See, e.g., *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 11-12 (1979) (applicants for parole); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (applicant for admission to practice law); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926) (applicant to practice before Board of Tax Appeals). Cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (claimant under Illinois Fair Employment Practices Act).

challenge to the procedures used in denying the application).<sup>5</sup> Other circuits have also held that initial applicants under a statutory entitlement scheme are entitled to due process,<sup>6</sup> and many district courts are in accord.<sup>7</sup>

The SCDD entitlement provisions clearly fall within these principles. Objective entitlement criteria are set forth in 38 U.S.C. §§ 301-423 and in Title 38 of the Code of Federal Regulations. Payments are not discretionary. See 38 U.S.C. §§ 310, 321, 331, 341 (using the mandatory language, "the United States will pay," or the survivors "shall be entitled"). Moreover, applicants for such compensation have a greater property interest than applicants for many other public benefits because SCDD compensation is, in a very real sense, "earned" by the military service and service-connected injuries that are prerequisites of entitlement.

Appellants do not press the distinction between applicants and recipients as a basis for deciding this case, and the Court should draw no such distinction. The Federal District Court for the Central District of California once held that applicants for SCDD compensation have no property interest in the receipt of such benefits, and this Court summarily affirmed that decision. *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D.Cal.), *aff'd mem.*

<sup>5</sup> See also *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for Section 8 rent subsidies are entitled to due process under *Griffeth* rationale, and also "by virtue of [their] membership in a class of individuals whom the Section 8 program was intended to benefit." *Id.* at 1215). Cf. *Geneva Towers Tenants Organization v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974).

<sup>6</sup> *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (applicant for state general assistance); *Kelly v. Railway Retirement Board*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under Railway Retirement Act). Accord *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (applicants initially denied social security benefits).

<sup>7</sup> *Davis v. United States*, 415 F. Supp. 1086, 1090-92, 1095-96 (D. Kan. 1976) (applicant for compensation for injuries incurred while engaged in prison employment); *Shaw v. Weinberger*, 395 F. Supp. 268, 270-71 (W.D.N.C. 1975) (applicant for Supplemental Security Income); *Alexander v. Silverman*, 356 F. Supp. 1179, 1179-80 (E.D. Wisc. 1973) (applicants for general relief); *Barnett v. Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare applicant); *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795, 796-97 (N.D. Ohio 1970) (applicant for public housing).

*sub nom. Gendron v. Levi*, 423 U.S. 802 (1975).<sup>8</sup> It is unclear, however, whether the applicant-recipient distinction was the basis for the summary affirmance. Moreover, that case involved a purely facial challenge to the fee limitation, and was decided without the careful inquiry into the actual operation of the V.A. adjudication system that was made by the district court in this case (see J.S.App. 26a-38a). The record developed in the instant case demonstrates the falsity of *Gendron's* assumptions about the "nonadversarial" operation of the V.A. system and the adequacy of representation by service organizations.

Summary affirmances, while binding on the lower courts, have only limited stare decisis effect when the same issues are presented for full consideration by this Court, particularly where constitutional issues are implicated. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). This Court has never before given plenary consideration to the constitutionality of these fee provisions in the face of procedural due process and First Amendment challenges such as those raised in this case. In considering the issues now presented, this Court should not give undue consideration to its summary affirmance of *Gendron*.<sup>9</sup>

<sup>8</sup> The applicant-recipient distinction drawn in *Gendron* is derived primarily from two statements in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972): first, that in order to have a property interest in an entitlement, a claimant must have more than a "unilateral expectation" of its receipt, and second, that there is a property interest in "legitimate" claims of entitlement. However, it seems clear that those statements were intended to distinguish between claims of entitlement resting upon some objectively identifiable basis, such as a statute, contract or "existing rules or understandings," see, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972), and those based upon a claimant's purely subjective belief that he should be entitled to a particular substantive right. The quoted passages were *not* intended to distinguish between "legitimate" and "illegitimate" claims in the sense that only favorably adjudicated claims could be considered "legitimate"; adoption of that view would require an assumption that all claims adjudication processes are 100% accurate, efficient and fair, which is simply untenable. Cf. *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975).

<sup>9</sup> The Court should likewise disregard *Demarest v. United States*, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2150 (1984), which simply followed what the Ninth Circuit regarded as the mandate of *Gendron*. The other lower court cases cited in Appellants' Brief at 18 n.17 rested on earlier Supreme Court authority which decided constitutional issues or issues of statutory construction other than the procedural due process and First Amendment

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**B. The freedom to retain counsel is an important element of procedural due process in V.A. adjudications.**

Appellees do not ask that the government appoint counsel for them; they ask only that they be allowed to spend their own money to hire attorneys to assist them in the V.A. claims process. Under the Due Process Clause, they are entitled to no less.

Before an individual may be finally deprived of a property or liberty interest, he is entitled to notice and an opportunity to be heard. *E.g.*, *Mathews v. Eldridge*, 424 U.S. at 333; *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). Moreover, the necessary hearing must be provided "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The specific requirements of due process are flexible, but in all cases the procedures must be fair and must befit the circumstances of the actual or potential deprivation. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In V.A. proceedings, this means that claimants must have the right to retain counsel. As Appellees have demonstrated, and as

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challenges raised in this case. The Supreme Court cases cited by Appellants are briefly described as follows: *Hines v. Lowrey*, 305 U.S. 85, 87, 90-91 (1938) (\$10 fee limit deprived state courts of jurisdiction to award higher fees for services rendered on behalf of an incompetent); *Margolin v. United States*, 269 U.S. 93, 95-96, 101-02 (1925) (fee limit upheld against substantive due process challenge by attorney); *Nelson v. Dysart*, 267 U.S. 540 (1925) (state workers' compensation statute limiting legal fees to amount set by court upheld against substantive due process challenge by attorney); *Calhoun v. Massie*, 253 U.S. 170, 173-75 (1920) (20% limit on legal fees payable under a special congressional appropriation for compensation of Civil War claims upheld against substantive due process challenge by attorney); *Newman v. Moyers*, 253 U.S. 182, 183, 185 (1920) (same); *Capital Trust Co. v. Calhoun*, 250 U.S. 208, 216-20 (1919) (20% limit on fees payable under special congressional appropriation upheld against substantive due process challenge by attorney, insofar as the excess fee was to be satisfied out of the money paid under the appropriation); *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895) (predecessor of \$10 fee limit upheld against substantive due process challenge by attorney); *United States v. Hall*, 98 U.S. 343, 349-58 (1878) (upholding constitutionality of Federal criminal statute prohibiting guardian from embezzling the military pension funds of his ward). None of these cases is even remotely dispositive of the issues now before the Court.

the district court found, "both the procedures and the substance entailed in presenting SCDD claims . . . are extremely complex" (J.S.App. 30a). V.A. claims processing is governed by an array of published and unpublished sources, including statutes, regulations, procedural manuals, circulars, guides and precedential decisions, the interrelation of which is so complicated that one regional office has sought authorization to purchase a computer to cross-reference them (J.S.App. 30a, J.A. 394). Claimants are permitted to introduce documentary, testimonial or other evidence, 38 C.F.R. § 3.103(b) (1984), and in fact must submit "evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102 (1984). Inaction can result in a final disallowance of the claim, with no right of appeal, as when the V.A. requests additional evidence and the claimant fails to respond within a year (J.S.App. 30a-31a). In such cases, all accrued or retroactive benefits are forfeited, even if the claim is later reopened (J.S.App. 31a). Claimants must meet deadlines for filing either a notice of disagreement or an appeal, depending upon the stage of the adjudication (J.S.App. 28a-29a). The substantive appeal must state all disputed issues of fact or law, 38 C.F.R. § 19.123(a) (1984); the claimant is "presumed to be in agreement with any statement of fact . . . to which no exception is taken." 38 C.F.R. § 19.121(b)(3) (1984).

A number of statutory presumptions apply to SCDD claims, depending upon the period and conditions of service, the nature of the disability and the date of onset. *See, e.g.*, 38 U.S.C. §§ 311-313, 333, 337, 353, 354. These presumptions are intended to protect claimants, but their language is confusing to a layman, and without advice as to their meaning, the intended protections may well be unavailing.<sup>10</sup>

<sup>10</sup> For instance, under 38 U.S.C. § 312 there is a presumption of service-connection for any chronic disease which manifests itself within one year after separation, despite lack of evidence of the disease during the service period. However, the V.A. frequently misapplies this presumption by denying benefits if the condition did not manifest itself within the one-year presumptive period. This kind of legal error will almost never be apparent to a claimant untrained in the law.

The claims themselves involve proof of medical disability, causation and degree of impairment, which are traditional tort issues on which attorneys can offer substantial assistance. Particularly in complex cases, SCDD claims require the acquisition, organization and presentation of sophisticated scientific and medical evidence, expert opinions and statistical data. Professional legal assistance is necessary to help claimants comply with procedural intricacies, identify witnesses with relevant information, secure and interpret documentary evidence, prevent or discover procedural or substantive errors by the V.A., present evidence at personal hearings, and delineate the legal and factual issues for adjudication or appeal.<sup>11</sup>

A 1983 V.A. study shows that 2,067 claims were filed for death or disability resulting from the testing of nuclear weapons; all but 14 were denied (J.A. 515). An additional 388 claims were filed based on exposure to radiation in Nagasaki or Hiroshima; all of those claims were denied (J.A. 515). Unless this Court accepts as accurate the V.A.'s determination that virtually no U.S. military personnel have been harmed by the testing or use of nuclear weapons, then something is seriously wrong with the V.A. claims adjudication process. Whether the process is denominated "adversarial" or "nonadversarial," the fact is that

<sup>11</sup> In fact, Appellants admit that attorneys would be of assistance to V.A. claimants in some cases, Government's motion to affirm *Gendron* at 7 n.9, but argue that due process rules are not designed to accommodate "the rare exceptions." Appellants' Brief at 36 (citing *Mathews v. Eldridge*, 424 U.S. at 344). There have been almost 19,000 atomic veteran and Agent Orange claims alone (J.A. 509, 515), many more thousand PTSD claims, and many other claims incapable of precise categorization in which attorneys could offer crucial assistance. We do not believe that *Mathews v. Eldridge* intended to sanction the kind of grievous sacrifices here imposed on thousands of American veterans, even assuming arguendo that a simple body count might show them to be a minority of the total number of claimants. The Due Process Clause is intended to protect the rights of individuals against arbitrary action by the state; the interests of these thousands of individuals cannot simply be deemed "rare exceptions" and disregarded. "[T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971).

it results in an inordinately high percentage of denials in complicated cases (J.A. 509, 515).<sup>12</sup> Applicants are unable to prove their claims to the satisfaction of the V.A., and they do not know why. As in Albert Maxwell's case, the "reason" for the denial of benefits is often a conclusory statement that the disability is not service-connected, and claimants have no recourse to effective assistance in establishing the disputed facts, whatever they might be, to convince the V.A. to the contrary. For this reason, it is especially important that applicants for SCDD compensation be allowed to hire attorneys so that they have a fair chance to establish their entitlement to benefits in the first instance.

Appellants argue that the present system provides V.A. claimants with a fair procedure, despite their acknowledgement that the \$10 fee limitation has the effect of excluding the participation of attorneys in the process.<sup>13</sup> Appellants' Brief at 19, 26, 30-31; S. Rep. No. 97-466, 97th Cong., 2d Sess. 102 (1982). This is plainly wrong.

The practical value of attorney representation in a variety of adjudicative settings has often been recognized by this Court. See, e.g., *Goldberg v. Kelly*, 397 U.S. at 270-71 (holding the right to retained counsel to be an element of due process in welfare termination hearings because "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel" (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932))).

Seeking to dispose of this issue simply by dubbing the V.A. process "informal" and "nonadversarial" not only distorts the facts (see J.S. App. 33a-38a), but fundamentally misconceives the nature of the problem. Regardless of the degree of formality

<sup>12</sup> Appellants cite several isolated passages from *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), which tend to cast doubt on the strength of the plaintiffs' case on the issue of causation. That opinion did not contain findings of fact after a trial. It was written to justify the \$180 million settlement in the face of opposition by the majority of plaintiffs who expressed their views at the Fairness Hearings. See *id.* at 759, 761-75. Naturally, in such a posture, the court would emphasize the risks of litigation for the plaintiffs.

<sup>13</sup> Only 2% of all V.A. claimants were represented by counsel in fiscal year 1983. See Appellants' Brief at 9 n.9.

of V.A. hearings, the burden of proof is on the applicant, 38 C.F.R. § 3.102 (1984), and if he fails to develop and present available evidence due to ignorance or incapacity, the proof fails, even in the absence of an "adversary."

The purportedly "informal" and "nonadversarial" nature of the proceeding does not eliminate the need for counsel. See *In re Gault*, 387 U.S. 1, 14-30, 34-42 (1967) (appointed counsel necessary in juvenile delinquency proceedings despite their nonadversarial nature). In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), for instance, this Court recognized the need for legal representation, even in the context of "informal" probation revocation proceedings because "the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires . . . the offering or dissecting of complex documentary evidence." *Id.* at 786-87 (emphasis added). This factor is even more compelling in V.A. adjudications because attorneys are needed not only to "offer and dissect" documentary evidence, such as medical records, statistical data and the opinions of experts, but also to appreciate its necessity in the first instance, determine from which sources it might be available, gather it, understand it and convince the factfinder of its probative value.

Nor does the fact that these adjudications relate to medical issues reduce the need for attorney representation.<sup>14</sup> In *Vitek* v.

<sup>14</sup> *Mathews v. Eldridge*, 424 U.S. at 343-44, distinguished the inquiry involved in social security disability claims from that involved in welfare claims by referring to the medical nature of disability claims, the predominance of documentary evidence and the relative lack of credibility and veracity as critical factors. This distinction was not drawn, however, to determine whether representation by counsel was necessary — social security disability claimants, unlike V.A. claimants, have a right to be represented by counsel, 20 C.F.R. §§ 404.950(a), 404.1705(a) (1984). Rather, the issue in *Eldridge* was whether an oral pretermination hearing would substantially reduce the risk of erroneous deprivation where a post-termination hearing was available. In that connection, the Court observed that in disability claims a written presentation would be more likely to suffice than in cases where credibility and veracity are more critical factors. *Id.* at 345. V.A. claimants have a right to oral hearings, so the *Eldridge* issue does not arise. Rather, the question in this case is whether attorneys could substantially assist applicants in investigating and preparing disability claims and in presenting medical evidence, whether in written form or through live testimony. Neither *Eldridge* nor the other cases cited by Appellants undercut the need for attorneys in such capacities.

*Jones*, 445 U.S. 480, 495 (1980), this Court held that a prison inmate threatened with transfer to a mental hospital was entitled to a pre-transfer due process hearing, despite the "medical nature of the inquiry." Four members of the Court believed that due process also required appointment of counsel, *id.* at 496-97 (White, Brennan, Marshall and Stevens, JJ.), and a fifth believed it required appointment of "qualified and independent assistance," but not necessarily a lawyer, *id.* at 497-500 (Powell, J., concurring in part). In *Vitek*, a "licensed psychiatrist or mental health professional," *id.* at 500, might have been as capable as a lawyer in protecting the inmate's rights, for the medical decision there was largely predictive — whether the individual's mental condition required that he be institutionalized.<sup>15</sup> Claims for SCDD compensation, in contrast, turn on the proof of past and current facts — the existence of a disability, its service-connection, and the disability "rating." These issues, similar to those involved in other personal injury actions, are exactly the kind on which an attorney's assistance would be invaluable. And, too, in SCDD claims the physical or psychological disability itself contributes significantly to the need for legal assistance. *Cf. id.* at 496-97.

The availability of additional safeguards through alternative<sup>16</sup> or subsequent<sup>17</sup> proceedings is also a factor in determining the constitutional adequacy of a particular procedure. Such protections are nonexistent in this case. The fee limit applies at all stages of V.A. proceedings, and there is no right to judicial

<sup>15</sup> Even if a medical professional could adequately "represent" a V.A. claimant, the \$10 fee limitation would prevent the veteran from securing such representation.

<sup>16</sup> See *Middendorf v. Henry*, 425 U.S. 25, 46-48 (1976) (counsel need not be appointed in summary court-martial proceedings in part due to the unique ability of the accused to refuse such proceedings and instead to accept a special or general court-martial, which would carry with it the right to retained or appointed counsel). *Cf. Boddie v. Connecticut*, 401 U.S. at 374-77 (absence of alternative forum to effect divorce supports conclusion that the state court filing fee, which precluded indigents, violated due process).

<sup>17</sup> See *Mathews v. Eldridge*, 424 U.S. at 349 (availability of post-termination hearings and judicial review prior to final deprivation of social security disability benefits heavily influenced the decision that pretermination hearings need not be provided).

review. 38 U.S.C. § 211(a). And because veterans cannot sue for disabilities stemming from their military service under the Federal Tort Claims Act, *Feres v. United States*, 340 U.S. 135 (1950), it is essential that they be given a fair hearing before the V.A.

It may be true that the V.A. does not hire attorneys specifically to act as "adversaries" to claimants,<sup>18</sup> but neither do other agencies charged with the distribution of statutory entitlements. Yet, the right to retained counsel has been held to be an element of procedural due process in claims adjudications before a wide variety of such agencies<sup>19</sup> and in other purportedly "nonadversarial" hearings.<sup>20</sup> Moreover, even where not judicially determined to be an element of due process, the right to retained

<sup>18</sup> However, many V.A. staff members are, in fact, attorneys, see Appellees' Brief at 7, and the district court found that V.A. claimants perceive the process as adversarial (J.S. App. 35a; see also J.A. 122-125, 149, 159, 180, 182, 187-189, 192-194, 200, 217).

<sup>19</sup> E.g., *Goldberg v. Kelly*, 397 U.S. at 270 (termination of public assistance payments); *Ressler v. Pierce*, 692 F.2d at 1219-20 (applications for Section 8 subsidized housing); *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1004 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971) (termination of lease in Federally assisted public housing project); *Ferguson v. Metropolitan Development & Housing Agency*, 485 F. Supp. 517, 522, 528 (M.D. Tenn. 1980) (termination of Section 8 housing subsidies); *Davis v. United States*, 415 F. Supp. at 1098 (claim for injuries resulting from employment with Federal prison); *Barnett v. Lindsay*, 319 F. Supp. at 611-12 (all hearings on welfare benefits, including initial denials).

<sup>20</sup> E.g., *In re Gault*, 387 U.S. at 34-42 (commitment proceedings for juvenile delinquents); *Specht v. Patterson*, 386 U.S. 605, 610 (1967) (sex offender commitment following criminal conviction); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1138 (7th Cir. 1983) (appointed counsel necessary for minor's petition to bypass parental notification of abortion); *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (expulsion from school); *Crook v. Baker*, 584 F. Supp. 1531, 1556, 1559-60 (E.D. Mich. 1984) (proceeding to rescind college degree); *Feinberg v. Federal Deposit Insurance Corp.*, 420 F. Supp. 109, 120 (D.D.C. 1976) (FDIC proceeding to suspend bank officer from duties); *Batchelder v. Kenton*, 383 F. Supp. 299, 302 (C.D. Cal. 1974) (inmate's parole date revocation); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (dismissal of students from public school).

counsel is uniformly provided for by statute or regulation in administrative proceedings similar to V.A. proceedings.<sup>21</sup>

Indeed, Appellants cite no cases which hold that retained counsel may not participate in claims adjudications comparable to the V.A. system. Instead, they rely on cases dealing with appointment of counsel for indigents in various noncriminal contexts, see Appellees' Brief at 27-28 n.18, a considerably different issue. Indeed, most of the "appointed counsel" cases cited by Appellants either implicitly or explicitly recognized the right to retained counsel, which is all that Appellees seek in this case. The only cases cited by Appellants that considered the issue held only that retained counsel need not be allowed in prison disciplinary hearings, *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976) (but inmates could consult with counsel outside the hearing room, see *id.* at 312); *Wolff v. McDonnell*, 418 U.S. at 570, or in procedures imposing high school suspensions of ten days or less, *Goss v. Lopez*, 419 U.S. at 583 (recognizing also that longer suspensions might require greater protections, and that even in "difficult" short suspensions, counsel should be allowed as a matter of discretion, *id.* at 584). Obvious factual differences make those cases completely unpersuasive.

Aside from the necessity of counsel, there is also an important liberty interest at stake: the right of an individual to consult with attorneys on matters affecting his legal rights. See, e.g., *Powell v. Alabama*, 287 U.S. at 60, 68-69; *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), cert. denied, 449 U.S. 820 (1980). The infringement of this right through the \$10 fee limitation is a serious intrusion on the liberty and privacy of the individual in deciding when legal counsel is necessary for the explanation or protection of his rights, how much he should pay for such services, and upon which matters he may receive legal counseling. These are issues traditionally left to the discretion of the individual without governmental interference. They are a matter of long tradition

<sup>21</sup> See, e.g., 5 U.S.C. § 555(b) (Administrative Procedure Act); 20 C.F.R. §§ 404.950(a), 404.1705(a) (1984) (SSA hearings); cf. 8 U.S.C. § 1362 (deportation hearings); 10 U.S.C. § 1553(c) (military discharge review hearings); 18 U.S.C. § 4208(2) (parole determination hearings); 5 C.F.R. § 771.302(c)(2) (1984) (Federal employment grievance hearings).

and deeply held values which may not be discarded without strong justification. This liberty interest is entitled to great weight in the assessment of the right to retained counsel in V.A. proceedings.

**C. Assistance from V.A. personnel and service organizations cannot substitute for professional legal assistance.**

Appellants make much of the fact that free lay representation is available through veterans' service organizations and argue that this, coupled with the assistance supposedly provided by V.A. personnel, obviates the need for legal representation. However, as the district court found, V.A. personnel do not live up to their statutory obligation to assist claimants in developing the facts pertinent to their claims,<sup>22</sup> 38 C.F.R. § 3.103(a), and service organization representation is inadequate, given the complexity of V.A. procedures and the difficult factual showings that many claimants must make.

Service organization representatives work under "crushing" caseloads; at the national level, each has "about 5 cases to present per working day" (J.A. 547). Under these circumstances, as the district court found, the service representatives

<sup>22</sup> In fact, the V.A. rarely goes beyond the claimant's service history and military medical records in "developing the facts" (*see, e.g.*, J.A. 158-159); it does not seek corroborating evidence, experts' reports or independent medical opinions (J.S.App. 34a). Instead, claims examiners "are allocated a mere 2.84 hours in which to develop the facts underlying an initial SCDD claim," and "their performance is measured in part by the speed with which they process claims" (J.S.App. 33a). An internal V.A. memo shows that it is V.A. policy to encourage claimants to waive their right to a personal hearing (J.A. 512, 248-249; *see also* J.A. 91, 93). And, though the V.A. rarely exercises its subpoena power to help support claims, it has occasionally subpoenaed documents to try to refute them (J.S.App. 35a). Furthermore, in the case of atomic veterans, the V.A. has failed to document patterns of exposure or disease by cross-referencing claims files and has never requested an expert opinion (J.S.App. 34a). Congress itself has found that the V.A. "has not promulgated permanent regulations setting forth specific guidelines, standards and criteria for the adjudication of claims ... based on exposure ... to ionizing radiation." Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984). Indeed, in light of its dual role as guardian of the government purse and benefactor of the veteran, *see* 38 C.F.R. § 3.103(a) (1984), it is questionable whether the V.A. can ever purport to represent adequately the interests of individual claimants.

rarely gather documentary evidence or seek expert opinions on behalf of their clients (J.S.App. 36a). In almost all cases, the record consists of the claimant's service history and his service medical history (J.S.App. 36a). At hearings before the local rating panels, these representatives commonly rely on the board members to ask questions of their clients, rather than eliciting the testimony themselves (J.S.App. 37a; J.A. 432). Service organization representatives often waive their clients' rights to a personal hearing, submitting instead an "informal hearing memorandum," which is usually two pages or less in length (J.S.App. 37a). In that case, the claimant never meets his representative. Even when personal hearings are not waived, the representative usually meets his client for the first time about half an hour before the hearing (J.S.App. 37a).

The district court found that even in presenting final administrative appeals it is "standard practice" for service organization representatives to submit nothing more than a one- or two-page handwritten "brief," which rarely cites legal authority, and is often written by the claimant rather than by the representative (J.S.App. 36a-37a). "Almost none" of the service representatives are lawyers (J.S.App. 36a); consequently, they seldom raise legal issues on appeal (J.A. 365). This often results in waiver of legal errors not raised (J.A. 344).

The district court found that "neither the V.A. officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to claimants" (J.S.App. 33a). That finding cannot be overturned unless this Court concludes that it was clearly erroneous. Given the record in this case, such a conclusion is impossible.<sup>23</sup>

<sup>23</sup> The experiences of the individual plaintiffs in this case exemplify the ineffectiveness of representation by service organizations. Don Cordray, now deceased, was represented by the Veterans of Foreign Wars ("VFW") in an appeal from the denial of SCDD benefits for oat cell carcinoma and related ailments that he believed were caused by his exposure to radiation during Operation Crossroads. The written statement of the VFW representative in

(footnote continued on next page)

**D. The interests of V.A. claimants in a fair presentation of their claims and access to legal advice far outweigh the asserted governmental interests.**

In assessing the fairness of a given procedure, the Court must balance the individual interests at stake against the interests of the government in maintaining the established procedure, in light of the risk of erroneous deprivation of the individual's interests and the probable value of the proposed additional safeguards in reducing that risk. *Mathews v. Eldridge*, 424 U.S. at 335.

The private interests of V.A. claimants are to obtain a fair adjudication of their claims and to maintain the freedom to consult attorneys concerning their legal rights. With respect to the interest of V.A. claimants in securing a fair claims procedure, the risk of erroneous deprivation resulting from the

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support of Cordray's final administrative appeal read, in its entirety, as follows:

"The veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by Atomic fallout.

"He believes his arthritis is of many years standing and had its inception during service.

"The third part of the appeal is for an increased evaluation of his Duodenal ulcer" (J.A. 44).

This statement apparently resulted in a hearing in which Cordray was "represented" by the VFW. Cordray did not attend this hearing, however, and, in fact, never received notice that it had been scheduled for him (J.A. 148).

Similarly, Albert Maxwell's representative from the Disabled American Veterans ("DAV") did nothing to help him develop the facts to support his disability claim (J.A. 310-312, 314). Without Maxwell's authorization, the representative later cancelled a personal hearing that had been scheduled for Maxwell and did not even notify him that the hearing had been cancelled (J.A. 83, 86). Maxwell did not find out about the cancellation, and assumed that his claim was still pending, until he contacted the DAV to check on the status of his claim and was told that his representative had retired and was no longer handling the case (J.A. 309-310). Another DAV representative unilaterally decided not to raise claims for certain of Maxwell's disabilities, without obtaining Maxwell's consent to waive those claims and without informing him of any reason for not raising them (J.A. 321-322). See also J.A. 122, 127, 131-138, 143-144, 149, 180, 182, 188, 197-199, 217.

current ban on legal representation, because unquantifiable,<sup>24</sup> must be assessed by examining the "probable value . . . of substitute procedural safeguards" *id.*, which was discussed in the preceding section of . . . . However, a claimant's separate interest in having essential . . . . access to legal counsel is a liberty interest which has . . . . weight of its own and must be weighed in the balance . . . . from any objective proof of the efficacy of the attorney's service.

The gravity of the loss to which the claimant is subjected is also entitled to weight in the balance, see *Goss v. Lopez*, 419 U.S. at 575-76; *Board of Regents v. Roth*, 408 U.S. at 570-71 & n.8; *Goldberg v. Kelly*, 397 U.S. at 262-64, and here that loss is severe. SCDD compensation, linked as it is to the disability or death of an individual who traditionally has been the family's breadwinner, often provides for the bare necessities of life. See Appellees' Brief at 25.

These important individual interests clearly outweigh the government's asserted interest in the preservation of the fee limitation. The district court found that the government had "asserted little or no cognizable interest in maintaining the \$10.00 fee restriction" (J.S.App. 39a). That finding is fully supported by an analysis of the statutory justifications advanced by Appellants.

According to Appellants, the fee limitation serves a governmental interest by helping to preserve the "nonadversarial" nature of V.A. claims processing. Of course, the right to retained counsel as an element of due process does not turn on a formulaic distinction between "adversarial" and "nonadversarial" proceedings. See pp. 16-19, *supra*. Moreover, the V.A. claims

<sup>24</sup> The risk of erroneous deprivation is difficult either to document or to refute on the basis of statistics alone. Approximately 26.5% of all V.A. administrative appeals result in reversal or remand (J.A. 584), which is certainly a significant error rate. But, as the district court found, statistics reflecting the success rate of claimants currently represented by attorneys are not very probative (J.S. App. 27a) because the number of such cases is statistically insignificant and because the attorneys currently representing V.A. claimants do so under the strictures of the fee limitation. This Court, too, has expressed dissatisfaction with mere statistics in reflecting the risk of erroneous deprivation. See *Mathews v. Eldridge*, 424 U.S. at 346.

adjudication process, as found by the district court (J.S.App. 33a-36a), is hardly "nonadversarial." See notes 18 & 22, *supra*.

But more importantly, Appellants erroneously assume that removal of the \$10 fee limit would somehow disrupt the statutory scheme for processing V.A. claims. This fear is unfounded. Appellees challenge none of the V.A.'s procedural rules other than the fee limitation. No veteran would be required to hire an attorney, nor would the government be compelled to appear in a more adversarial role. Assistance from service organizations would continue as an option in any case in which the claimant prefers such lay representation. Moreover, the other statutory provisions regarding the informality of proceedings would remain intact. Finally, and significantly, participation by attorneys, where the claimant desires such assistance, would help to assure that the V.A. complies with its own regulations.

The other asserted justifications for the fee limitation do not tip the balance in favor of its retention. Appellants, understandably, have all but abandoned reference to the governmental interest traditionally advanced to justify the fee limit — concern for the welfare of veterans. There is no reason to believe that veterans are in greater need of protection from "overreaching and sharp practices" than are recipients of other statutory benefits or the public generally. And while an interest in the welfare of veterans may have motivated the statute's original enactment, radically changed circumstances since its inception actually make the fee limit antithetical to that goal.

Appellants also suggest that the statute is necessary to ensure that the V.A. benefits paid "inure solely to the benefit of the [veteran]." Appellants' Brief at 31. The bitter irony of that statement cannot escape a veteran whose claim is denied due to his inability to develop and present it effectively. In the absence of the fee limit, any claimant concerned about the cost of legal assistance could, and predictably would, seek the free assistance of a service organization representative, at least during the initial application stages. If the claim is initially denied, however, the applicant might well conclude that professional legal assistance is necessary on appeal, and he should be free to make that decision.

As for the need to protect the Treasury from fraud, only the most cynical assumptions would support the view that removal of the fee limit would somehow entice attorneys to bring fraudulent claims on behalf of veterans. In any event, such practices are sufficiently deterred by ethical rules and criminal penalties currently in place.

Appellants raise for the first time on appeal the potential for increased administrative costs. Appellants' Brief at 30 n.29. However, that argument is disingenuous, for the legislative analysis estimated no increase in administrative costs as a result of repealing the fee limit. S. Rep. No. 98-130, 98th Cong., 1st Sess. 50 (1983). Increased costs, if a factor at all, are not of "controlling weight," *Mathews v. Eldridge*, 424 U.S. at 348, and cannot outweigh the individual interests at stake here. See *Goldberg v. Kelly*, 397 U.S. at 265-66. For while it is true that the V.A. is charged with processing a large number of claims quickly and efficiently, Appellants' Brief at 27, "the Constitution recognizes higher values than speed and efficiency." *Fuentes v. Shevin*, 407 U.S. at 90 n.22 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). The Due Process Clause was designed specifically to protect individuals from the excess of "efficiency" that is often the hallmark of an unfair proceeding. *Id.*

## II. THE \$10 FEE LIMIT IMPERMISSIBLY INFRINGES CLAIMANTS' FIRST AMENDMENT RIGHTS OF PETITION AND ACCESS TO JUSTICE.

### A. An application for SCDD benefits constitutes an exercise of the right of petition, and the fee limit impairs the exercise of that right and the right of access to justice.

The First Amendment right to petition the government for redress of grievances extends to the courts and administrative agencies, as well as the legislature. *E.g.*, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Where, as here, the grievance is one of disability or death stemming from military service on behalf of the nation, an application for compensation filed with a Federal agency vested with the sole power to redress such injuries is quintessentially a "petition" for "redress of grievances." The petition of a "soldier of the Revolution" was specifically cited in early House debates as a prototypic exercise of the right of petition. Speech of John

Quincy Adams Upon the Right of the People to Petition (1838), reprinted in *The Anti-Slavery Crusade in America* 23 (J. McPherson & W. Katz eds. 1969). This reasoning applies with even greater force in the case of atomic veteran and Agent Orange claims, where the injury is not one stemming simply from the circumstances of wartime service in general, or from an injury inflicted by the enemy, but rather from a specific policy decision on the part of the United States to employ a particular type of weapon or chemical agent.<sup>25</sup>

The related right of access to the courts is now recognized as one aspect of the First Amendment right of petition.<sup>26</sup> Thus, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 510, this Court held that highway carriers applying to administrative agencies for the acquisition of operating rights, as well as those opposing such applications, have a constitutional right of access to such agencies grounded in the right of petition. In this sense, the "right of access" is really a right of access to justice, not merely to the courts. Since veterans and their survivors are foreclosed from seeking redress through the courts under the *Feres* doctrine, their right of access to the V.A. as an adjudicative forum must be accorded the same protection as is the right of access to the courts in other contexts.

<sup>25</sup> NAAV is not an anti-nuclear organization. It simply believes that the government must compensate its citizens for injuries incurred as a result of its decision to test and use nuclear weapons, and it must give them a fair opportunity to prove those injuries.

<sup>26</sup> See, e.g., *Hudson v. Palmer*, 104 S.Ct. 3194, 3198 (1984) ("Like others, prisoners have the constitutional right to petition the Government for redress of their grievances which includes a reasonable right of access to the courts."); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 510 ("The right of access to the courts is indeed but one aspect of the right of petition."); *Milhouse v. Carlson*, 652 F.2d 371, 373-74 (3d Cir. 1981); *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979); *Pizzolato v. Perez*, 524 F. Supp. 914, 921 (E.D. La. 1981). Cf. *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-23 (1967) (right of petition is among the rights invaded when collective action to assert legal rights of association's members through litigation or administrative adjudication is prohibited); *accord In re Primus*, 436 U.S. 412, 426 (1978); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *NAACP v. Button*, 371 U.S. 415, 428-31 (1963).

A statute infringes the right of access to justice, and hence the right of petition, if it erects impediments, either on its face or as applied, to the effective formulation of the grievance. Hence, absent a reasonable alternative, prison officials cannot deprive inmates of the legal advice available to them through "jailhouse lawyers," *Johnson v. Avery*, 393 U.S. 483, 490 (1969), and thus impair their ability to prepare habeas corpus petitions, or even civil rights actions, *Wolff v. McDonnell*, 418 U.S. at 577-80.<sup>27</sup> This Court and others have gone even further by requiring state expenditure to furnish inmates with "adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Gilmore v. Lynch*, 319 F. Supp. 105, 110-11 (N.D. Cal. 1970) (three-judge court), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

The import of these decisions is that the right of access to the courts requires more than physical access; there is no suggestion in *Avery*, *Bounds* or *Wolff* that the prisoners were, in fact, prevented from filing habeas petitions or civil rights actions. But physical access was not enough to satisfy the constitutional guarantee; the inmates had to be provided with the means to make such access "meaningful." *Bounds v. Smith*, 430 U.S. at 822 (right of access must be "adequate, effective, and meaningful"). The concept of "meaningful access" goes to the ability of the petitioner to formulate his grievance in such a way that it will be susceptible of receiving meaningful consideration by the adjudicator. See *id.* at 828 (inmates must be given assistance in preparing "meaningful legal papers"); *Gilmore v. Lynch*, 319 F. Supp. at 110 (" 'Access to courts' . . . encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him").

In the prison context, due to the state's physical incarceration of inmates and the liberty and constitutional issues at stake in

<sup>27</sup> *Wolff v. McDonnell*, 418 U.S. at 579, and certain other cases, e.g., *Boddie v. Connecticut*, 401 U.S. at 382, found the right of access grounded in the Due Process Clause. There is no evident consistency in the cases as to the constitutional basis of the right. It may, in fact, derive from both the First and Fifth Amendments. But where, as here, the petitioning parties seek not only access to the procedural mechanisms provided by the government, but substantive redress as well, the First Amendment is clearly implicated.

their petitions, this concept required state expenditure to assist in the meaningful exercise of the right. But the rights of access and petition are not limited to the prison context or to the vindication of constitutional rights. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508; *Boddie v. Connecticut*, 401 U.S. 371; *Ryland v. Shapiro*, 708 F.2d 967, 971-75 (5th Cir. 1983). The rationale underlying the right of access cases dictates that the government may not, without strong justification, restrict an individual's access to justice by depriving him of the means necessary to make such access meaningful, including the ability effectively to formulate his grievance.

Even aside from the question of access to justice, the government may not impose unnecessary impediments on the effective exercise of the right of petition. *E.g., Clean-up '84 v. Heinrich*, 582 F. Supp. 125,126 (M.D. Fla. 1984) (preliminary injunction granted against statute prohibiting election-day circulation of petitions near polling places); *Moffett v. Killian*, 360 F. Supp. 228, 231-32 (D. Conn. 1973) (three-judge court) (registration fee for lobbyists in excess of amount required to administer disclosure requirements of statute was an unconstitutional "tax" on the right of petition); *Jeanette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 585 (D.D.C.) (three-judge court), *aff'd mem.*, 409 U.S. 972 (1972) (prohibition against assemblies on capitol grounds violates, *inter alia*, right of petition).

Arbitrary spending limits which hinder an individual in asserting the right of petition also run directly counter to the rationale of *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976), where this Court struck down dollar limitations on personal expenditures for political campaigns due to their "substantial and direct restrictions" on the ability of individuals to exercise their First Amendment rights. *Id.* at 58-59. So, too, where a private citizen desires to use his own money in pursuance of the First Amendment right of petition, the government's interference by placing a ceiling on the amount he may spend, especially where the ceiling is so low that it effectively precludes him from securing the assistance he needs, runs afoul of the First Amendment.

For veterans, the \$10 fee limitation creates a barrier to the effective preparation of V.A. claims and perpetuates an adjudicative atmosphere in which complicated claims almost never can be proved to the satisfaction of the V.A. In other less complex cases, the \$10 limit similarly impairs the ability of claimants to formulate their grievances for unique reasons ranging from the illiteracy or incompetency of the veteran to individual proof problems which require professional assistance for proper development and presentation. In short, the fee limit impairs the ability of claimants to formulate their grievances in many instances which are incapable of precise categorization (*see, e.g., J.A.* 244-245, 331-333), and thereby deprives them of receiving meaningful consideration of their claims by the V.A. This effectively denies veterans a meaningful right of petition and access to justice.<sup>28</sup>

**B. This serious infringement of the First Amendment right of petition cannot be justified because the statutes advance no substantial government interest and, in any event, are overbroad.**

The right of petition deserves the same constitutional protection as other First Amendment rights. *See United Mine Workers v. Illinois State Bar Association*, 389 U.S. at 222; *cf. Thomas v. Collins*, 323 U.S. 516 (1945) (right of assembly). Where First Amendment rights are at stake, government regulation is subject to exacting scrutiny, *Buckley v. Valeo*, 424 U.S. at 44-45, and it must be drawn with "narrow specificity." *NAACP v. Button*, 371 U.S. at 433, 438. Thus, any statute impinging on the effective exercise of First Amendment rights must substantially advance not only a legitimate government interest, but a compelling one, and even if it does, it must be drawn narrowly so as to infringe the First Amendment as little as is necessary to accomplish its purposes. *In re Primus*, 436 U.S. at 432; *Buckley v. Valeo*, 424 U.S. at 25, 64-65; *American Civil Liberties Union of New Jersey v. New Jersey Election Law Enforcement Commission*, 509 F. Supp. 1123, 1128-29 (D.N.J. 1981) (three-judge court); *Citizens Energy Coalition of Indiana, Inc. v. Sendak*,

<sup>28</sup> Contrary to Appellants' assertion, the First Amendment issues presented here were not resolved in *Staub v. Roudebush*, 424 F. Supp. 1346, 1349 (D.D.C. 1976), *vacated and remanded*, 574 F.2d 637 (D.C.Cir. 1978) (Table). That case involved a claim that the fee limit improperly impaired claimants' right of association with attorneys and did not address at all the right of petition.

459 F. Supp. 248, 258 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979).

The government's asserted interests in preserving the fee limitation were discussed at pp. 23-25, *supra*. A broad phrasing of those interests may make them appear more weighty than they are. Thus, "protecting the Federal fisc from fraud" or "promoting the welfare of veterans" are lofty-sounding goals which may pass for "compelling" interests when stated in the abstract. However, none of these interests, when considered in the context of V.A. claims adjudications, constitutes a compelling state interest. In any event, the \$10 fee limit is not substantially related to achieving such goals.

At the very least, these goals could be achieved by far less drastic measures, such as reasonable yet realistic fee schedules or specific rules of procedure designed to foster informality while allowing attorney representation. We do not ask this Court to design such alternative rules, but where, as here, First Amendment rights are at stake, it is entirely proper for the Court to consider such legislative alternatives in assessing the validity of the means actually employed.

### CONCLUSION

For the foregoing reasons, the order of the United States District Court for the Northern District of California preliminarily enjoining further enforcement of 38 U.S.C. §§ 3404-3405 should be affirmed in its entirety.

Respectfully submitted,

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